IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 219 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

MAGANDAS BECHARDAS DECD. THRO'HEIRS KASHI WD/O MAGANLAL PATE

Versus

BOTHABHAI BHUVABHAI PATEL DECDTHRO' HEIRS MAHENDRABHAI PATEL

Appearance:

MR PN BAVISHI for Petitioners

MR PUJARA for Respondent

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision:27/07/2000

C.A.V. JUDGEMENT

1. This appeal seeks to challenge the judgment and order of the learned 2nd Joint District Judge, Mehsana in Civil Miscellaneous Application No.77 of 1999 whereby the appellants' prayer to quash and set aside the order of the learned Extra Assistant Judge, Mehsana dated

11.3.1999 in Regular Civil Appeal No.54 of 1994 was rejected. The original Regular Civil Appeal No.54 of 1994 was preferred from the judgment and decree passed in Regular Civil Suit No.314 of 1967 on 31.1.1994. The said appeal was dismissed for default under Order 41 Rule 17 of the Code of Civil Procedure. The impugned order in Civil Miscellaneous Application No.77 of 1999 is challenged mainly on the ground that at the time of hearing of the original Regular Civil Appeal, the advocates of the appellants could not proceed for sufficient reasons and that the appellants, who are poor agriculturists, should not be made to suffer for the fault, if any, on the part of their advocates. Seven of the respondents herein have appeared on caveat and an affidavit-in-reply on behalf of the respondents is filed by the respondent No.2.

2. A few points from the background of facts of this case are required to be noted. The respondents are the original plaintiffs in Regular Civil Suit No.314 of 1967 which came to be decreed after about 27 years on 31.1.1994. The appeal preferred therefrom by the present appellants, being Regular Civil Appeal No.54 of 1994, was filed on 25.3.1994 and it remained pending for about five years. This appeal is stated by the respondents to have been the oldest regular civil appeal at the relevant time in the court concerned. The respondents have also averred that the hearing of that appeal was adjourned from time to time only on account of the appellants' applications on the ground that the concerned lawyers were engaged in some domestic and social work or that they could not contact their clients before the date of hearing or that the concerned lawyers and their clients could not remain present on account of some so-called unavoidable circumstances. This situation is also recorded in the order dismissing the appeal for default. In fact, the learned Judge has, while dismissing the appeal for default, observed as under:

> "At the time of passing order in the present appeal for making the dismissal under Order 41 Rule 17 of C.P.C., I am conscious of the fact that it is a painful task for the concerned Judge to make the dismissal of present appeal because it was expected since 2 years that there would be appropriate and effective final hearing of present appeal. However, it has been proceeded by granting adjournment from time to time under one or another pretext canvassed and/or conveyed by filing application for adjournment with affixation of Court fee stamp of 0.65 paise. I

am of the view that there would not be proper and reasonable justification for a Judge acting as an appellate authority to grant adjournment in a casual manner because it is an appropriate time to impress upon the concerned such type of litigants that such type of unwarranted and undesirable approach and attitude in the administration of justice cannot be encouraged, for otherwise there would be impression in the mind of concerned litigants as well as their lawyers that the adjournments are being granted in a casual manner by way of routine practice and procedure of civil Court."

3. It appears from the record that two learned advocates were engaged by the appellants to represent them in the original Regular Civil Appeal No.54 of 1994. While making an application for setting aside the ex parte order in appeal, the appellants have averred that on the date of dismissal of the appeal, one of the advocates was suddenly taken ill and during the course of that day he was supposed to remain under medical treatment and hence could not go to the court. Although no reason is given for the absence of the other advocate, it transpires from the record that an adjournment application was given by that advocate vide Ex.63 and the said application was rejected. It is noted in the impugned order that the first mentioned advocate Shri C.G.Bhavsar has not filed any affidavit and has not produced any documents regarding his sickness and no reason is given as to why the other senior advocate Shri R.D.Shah did not remain present on 11.3.1999 when the appeal was dismissed for default. In this context, an affidavit of Shri C.G.Bhavsar is filed in the present proceedings vide Civil Application No.4646 of 2000. The affidavit reads as under:

" I, Shri C.G.Bhavsar, has been practising as an advocate at Mehsana since last about 15 years. I was engaged in this work by four appellants and with Shri R.D.Shah, advocate. That, on the day of the final hearing of the appeal, as I became sick, and hence could not appear before the appellate court and the appeal has been dismissed. I further say that at the time of hearing of the application for restoration, there was discussion about producing my medical certificate or affidavit but, the learned Judge Shri K.C.Kella told that it is not necessary for the advocate either to submit affidavit of his sickness or to produce medical certificate to

prove his sickness."

Whereas the restoration application was heard by the learned 2nd Joint District Judge of Mehsana Mr.D.R.Shah, there could not have been any question of the learned Extra Assistant Judge Shri K.C.Kella, who dismissed the appeal for default, telling the learned advocate that it was not necessary for the advocate either to submit affidavit of his sickness or to produce medical certificate to prove his sickness. On the other hand, if, as stated in the affidavit, at the time of hearing of the application for restoration the learned advocate was told as above, the learned Judge deciding the restoration application would not have observed in the impugned order that the learned advocate had not produced any document for his sickness. Thus, in short, except the bare words of the learned advocate, who does not mind making incorrect statement and casting doubt against the learned District Judge on oath before this Court, there is nothing on record to suggest that the learned advocate was taken ill at the relevant time. According to the certified copy of the Rojnama of the proceedings held in Civil Appeal No.54 of 1994, on the fateful day, i.e. 11.3.1999, the advocates of the parties are shown to be present. As for the another advocate on record, except his filing of an application for adjournment, which was rejected, there is nothing to explain his absence presumably after submitting the application for adjournment.

4. The application for adjournment which was rejected states the first reason to be that the appellant was directed to remain personally present and that the appellant has not been able to come due to death in his family; and that the advocate was proceeding to Ahmedabad on that day to attend a marriage. No reason is forthcoming for the learned advocate to assume that the Court would grant adjournment for the umpteenth time on such grounds.

5. There were other objections to the restoration application insofar as, out of more than 24 appellants, only 15 of them had signed the vakalatnama of the learned advocate Shri C.G.Bhavsar and yet he had filed Civil Miscellaneous Application No.77 of 1999 on behalf of all the appellants. Even the name of a dead person is stated to have been shown to be an applicant in the said application. Under these circumstances, the Civil Miscellaneous Application of the appellants has come to be dismissed by the impugned judgment and order dated 29.4.2000. Even thereafter, after obtaining a certified

copy of the impugned order on 5.5.2000, the present appeal is presented on 19.6.2000 also mentioning that the application for final decree in the court of the Civil Judge (J.D.), Kalol was fixed for hearing on 17.6.2000.

6. The above stated record of facts leaves no room for any doubt as to the intentions and tactics adopted by the learned advocates on behalf of the appellants. The questions that, therefore, arise are whether the appellants can now be heard to say that they would suffer on account of the absence of their advocates at the relevant time and whether the past record of the appellants' appearance in general can be taken into account in deciding the application for setting aside an ex parte order. In this context, the learned advocate for the appellants relied upon the judgment of the Gauhati High Court in NIRMAL DAS GUPTA v. PRASANTA DAS GUPTA (AIR 1985 GAUHATI 3) and particularly pointed out the following observations of the Hon'ble Supreme Court in RAFIQ v. MUNSILAL (AIR 1981 SC 1400) quoted therein:

> "The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission or misdemeanour of his agent. The answer obviously is in the negative."

The ratio of RAFIQ case (supra) is later on quoted and considered by the Hon'ble Supreme Court in (1993) 2 SCC 185 [SALIL DUTTA v. T.M. AND M.C. PVT. LTD.] wherein the Hon'ble Supreme Court has observed as under:

> "The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him are the acts and statements of the principal, i.e. the party who engaged him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognized. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq case must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As mentioned hereinabove, this was

> an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear - they chose to non-cooperate with the court. Having adopted such a stand towards the court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted." (emphasis supplied)

Here in the facts of the present case, assuming as correct the averments that the appellants are poor agriculturists, it cannot be believed that all of them were totally ignorant and inexperienced litigants in view of the fact that they have been involved in a litigation lasting over three decades, and non-cooperation by them or on their behalf is writ large on the record.

7. As observed by the Hon'ble Supreme Court, albeit in a different context, in STATE OF WEST BENGAL v. PRANAB RANJAN ROY [(1998) 3 SCC 209]: "Order 41 Rule 17 of the Code deals with the consequence when the appellant in an appeal does not "appear". In all such instances, "appearance" would include appearance by the advocate, because it is made so clear in Order 3 Rule 1 of the Code that any appearance required by law to be made in any court may be made "by the party in person, or by his recognized agent or by his pleader on his behalf". Therefore, if these provisions are strictly applied, it would be illogical to ascribe plurality to a party in the matter of appearance according to its convenience.

8. In the Scheme of the Code of Civil Procedure, the appearance of an advocate is treated as the appearance of the party who has engaged the advocate. Thus, the party gets all the benefits and advantages of its appearance through an advocate. In a given case, a party may be

enjoying the fruits of an interim order and delay in the final disposal of a litigation. Then, conversely, when a party has to suffer an ex parte or adverse order due to a deliberate default on the part of his advocate, it can hardly be allowed to detach itself from its advocate and say that the default was on the part of his advocate for which it ought not to be made to suffer. It is not always true that a party which is aggrieved by an ex parte order is bound to be suffering injustice. The party on the other side who might be languishing in the court for years or decades can be the party who was suffering injustice. The discretion of the court, even in the exercise of its inherent powers, to restore a case by setting aside an ex parte order ought not to be exercised to undo justice.

9. The relevant provision of the C.P.C., i.e. Order 41 Rule 19, reads as under:

> "19. Re-admission of appeal dismissed for default.
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> Where an appeal is dismissed under Rule 11, sub-rule (2) or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

It becomes clear from the reading of this provision that, for re-admission of appeal, the appellant is required to prove the cause of his being prevented from appearing and such cause is required to be sufficient. Such cause may not be required to be proved beyond reasonable doubt, but, at the same time, a mere assertion or averment which does not inspire any confidence in the facts and circumstances of the case, would not be sufficient. Similarly, sufficiency of the cause would also be examined in the particular facts and circumstances of each case. Although, no strict cut and dried rule can be laid down and the question of sufficient cause demands a generous approach, it is equally important that the judicial orders are not casually made or cancelled necessarily resulting into further delays - defeating the cause of justice. In the facts of the present case, as seen earlier, the appellants have, in fact, appeared through the advocate but practically refused to

participate in the proceedings for reasons which are neither proved nor sufficient. Although the earlier attitude and demeanours of the appellants may not be relevant if sufficient cause were proved for absence on the day of dismissal of the appeal, they have to be taken into account while examining the probative value of the assertions and averments advanced as sufficient cause. As observed by the Hon'ble Supreme Court in SALIL DUTTA (supra), if a party has adopted a non-cooperative stand, it has no right to ask its indulgence. Also, where the party has failed to prove any sufficient cause, no order of restoration ought to be made on any conditions as was lastly suggested by the learned advocate for the appellant.

10. In RAM NATH v. DY. DIRECTOR OF CONSOLIDATION [1987 (Supp) SCC 683], where a petition was filed for recalling the order even on the ground that the learned counsel was busy in another court on the date of hearing, Their Lordships of the Supreme Court have observed as under:

> "We are not sure as to who is making this application and whether the appellant is at all aware of these events. We find no justification for recalling the order on the plea that the counsel was busy somewhere. We were not inclined to act upon this kind of plea but on the basis that otherwise the appellant would suffer loss for no fault of his, we have decided to hear the counsel. This practice should not be permitted in this Court any further."

These observations are respectfully accepted as guidelines and are required to be abided by the Bar and the Bench generally in all legal proceedings.

11. In the facts and circumstances as above, the appellants have failed to prove that they were prevented by any sufficient cause from appearing when the appeal was called on for hearing and have also failed to make out any ground for interfering with the impugned order. On the contrary, the appellants' original application for re-admission of appeal was lacking in bona fide and the demeanours of their advocates during the appellate proceedings can only be deprecated.

12. In the result, the appeal is summarily dismissed with costs. A copy of this judgment shall be furnished to the office of the Bar Council of Gujarat.

Sd/-

(KMG Thilake)

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